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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 744 and 774

[Docket No. 140813667-4667-01]

RIN: 0694-AG27

Expansion of the Microprocessor Military End-Use and End-User Control

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final Rule.

SUMMARY: The Bureau of Industry and Security (BIS) is amending the microprocessor military end-use and end-user control in the Export Administration Regulations by expanding the scope of microprocessors subject to the restriction to harmonize with technological advances to microprocessor chips and expand the scope to include related software and technology for the development and production of these chips. In addition, this rule adds a prohibition on the use of license exceptions (including License Exception ENC) and otherwise expands license requirements for exports, reexports, or transfers (in-country) of microprocessors subject to the military end-use and end-user restriction. This expansion is consistent with the foreign policy objectives of the United States of preventing U.S. exports that might contribute to destabilizing military capabilities against the United States and its citizens. The foreign policy report explaining the expansion was sent to Congress on

December 1, 2014. This rule also expands the scope of controls to cover in-country transfers, in order to control in-country transfers to prohibited military end users or end uses. BIS is also making editorial and format revisions to this section to improve clarity.

DATES: Effective date: This rule is effective [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Sharron Cook, Office of Exporter Services, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482-2440 or by email at Sharron.cook@bis.doc.gov.

SUPPLEMENTARY INFORMATION

Background

On January 14, 2003 (68 FR 1796), the Bureau of Industry and Security (BIS) published a rule to implement the microprocessor military end-user and end-use control in § 744.17 of the Export Administration Regulations (EAR). That rule imposed an end-use and end-user based license requirement on the export of certain microprocessors to military end uses and end users in countries in Country Group D:1 (see Supplement No. 1 to Part 740 of the EAR).

End-use and end-user based controls are in addition to any controls based on the technical parameters of the item. Thus, the end-use and end-user based license requirements set forth in § 744.17 may apply to a transaction, even if the Commerce Country Chart indicates there are no license requirements, i.e., no “X” in the box. When controls set forth under more than one section of the EAR apply to a transaction, the license requirements for such a transaction will be determined based on the requirements of all applicable sections of the EAR, and license applications will be reviewed under all applicable licensing policies.

To determine license requirements, one should follow the decision tree flowchart in Supplement No. 1 to part 732. An ECCN may have multiple license requirements, e.g., CCL-based, end-use based, or end-user based. Also note that to use a license exception, each license requirement on an ECCN must be overcome.

Revisions to § 744.17 “Restrictions on certain exports, reexports and transfers (in-country) of microprocessors and associated “software” and “technology” for ‘military end uses’ and to ‘military end users.’”

Since 744.17 was established, BIS’s administration of export controls has increasingly focused on end uses and end users. Consistent with this change, BIS is adding in-country transfer controls to this section of the EAR to incorporate restrictions that would apply even if a transaction is licensed for a particular destination.

BIS is also expanding the scope of microprocessors requiring a license under §744.17 by removing the specific ECCN (3A991.a.1) from the text, so that the prohibition applies to any microprocessor meeting the specified performance criteria, and associated “software” and “technology.” As encryption and other “information security” functionality has become more commonplace in hardware, BIS has concluded that microprocessors classified under any ECCN in Category 5 - Part 2 of the EAR (including ECCN 5A992.c for ‘mass market’ encryption chips and ECCN 5A002 for a variety of non-‘mass market’ microprocessors) warrant the same license requirement as BIS currently requires under §744.17 for the microprocessors classified outside of Category 5 - Part 2, even if no license would be required (NLR) or License Exception ENC would otherwise be available. Because of this scope revision, the first sentence of paragraph (a) is revised to clarify that this license requirement is

in addition to all license requirements set forth in the EAR and not just anti-terrorism reasons for control. Furthermore, BIS is expanding the scope of the license requirement in § 744.17 to include “technology” and “software” for the “development” and “production” of the microprocessors described in § 744.17(a).

In relation to § 744.17(f) “Exceptions,” BIS is also moving, from paragraph (a) to paragraph (f), text that exempted from § 744.17 personnel and agencies of the U.S. Government or agencies of a cooperating government under License Exception GOV. In addition to harmonizing § 744.17(f) with recent changes in License Exception GOV, BIS is expanding paragraph (f) to include exports, reexports and transfers (in-country) “on behalf of” the U.S. Government or agencies of a cooperating government and updating and incorporating the related citation references.

BIS is also fixing the use of double and single quotes around the terms in this section to increase clarity. Single quotes are used for terms that are defined in a section where it appears, whereas double quotes indicate a term defined in § 772.1 of the EAR.

Revisions to the Supplement No. 1 to part 774 “Commerce Control List”

This rule adds a reference to the license requirements in § 744.17 in the affected ECCNs of the Commerce Control List. Specifically, ECCNs 3A001, 3D002, 3D991, 3E001, 3E002, 3E991, 5A002, 5A992, 5D002, 5D992, 5E002 and 5E992 are amended by adding a License Requirement Note after the Control Table in the License Requirements section. This reference in the ECCN may help prevent exporters from missing this combination item/end-use based license requirement.

ECCN 3A991 already had a license requirement note pointing to the license requirements in § 744.17. This rule replaces the existing note with the same one being added to the other twelve ECCNs in this rule.

Export Administration Act

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129 (March 13, 2013) and as extended by the Notice of August 7, 2014, 79 FR 46957 (August 11, 2014), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Export Administration Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222 as amended by Executive Order 13637.

Savings Clause

Shipments of items removed from license exception eligibility or eligibility for export, reexport, or transfer (in-country) without a license as a result of this regulatory action that were on dock for loading, on lighter, laden aboard a carrier, or en route aboard a carrier to a port, on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], pursuant to actual orders to a destination, may proceed to that destination under the previous license exception eligibility or without a license so long as they have been exported, reexported, or transferred (in-country) before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. Any such items not actually exported, reexported, or transferred (in-country)

before midnight, on [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], require a license in accordance with this regulation.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been determined to be not significant for purposes of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves collections previously approved by OMB under control number 0694–0088, Simplified Network Application Processing System, which includes, among other things, license applications and carries a burden estimate of 43.8 minutes for a manual or electronic submission. Total burden hours associated with the PRA and OMB control number 0694–0088 are not expected to increase as a result of this rule. You may send comments regarding the collection of information associated with this rule, including

suggestions for reducing the burden, to Jasmeet K. Seehra, Office of Management and Budget (OMB), by e-mail to Jasmeet_K_Seehra@omb.eop.gov, or by fax to (202) 395-7285.

3. This rule does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public comment and a delay in effective date are inapplicable because this regulation involves a military or foreign affairs function of the United States. (*See* 5 U.S.C. 553(a)(1)). If this rule were delayed to allow for notice and comment and a delay in effective date, these high performance microprocessors, as well as associated development and production technology and software would continue to be exported, reexported and transferred (in-country) to military end uses or military end users to the detriment of the national security or foreign policy interests of the United States. In addition, publishing a proposed rule would give notice of the U.S. Government's intention to restrict the export, reexport and transfer of these items and would create an incentive to either accelerate exports, reexports and transfers of these items to conduct activities that are contrary to the national security or foreign policy interests of the United States, and/or to take steps to try to limit the impact of the this expanded control once a final rule was published. No other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are not applicable. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

List of Subjects

15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism

15 CFR Part 774

Exports, Reporting and recordkeeping requirements

Accordingly, Parts 744 and 774 of the Export Administration Regulations (15 CFR parts 730-774) are amended as follows:

Part 744 - [AMENDED]

1. The authority citation for 15 CFR Part 744 continues to read as follows:

Authority: 50 U.S.C. app. 2401 et seq.; 50 U.S.C. 1701 et seq.; 22 U.S.C. 3201 et seq.; 42 U.S.C. 2139a; 22 U.S.C. 7201 et seq.; 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 12947, 60 FR 5079, 3 CFR, 1995 Comp., p. 356; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of January 21, 2014, 79 FR 3721 (January 22, 2014); Notice of August 7, 2014, 79 FR 46959 (August 11, 2014); Notice of September 17, 2014, 79 FR 56475 (September 19, 2014); Notice of November 7, 2014, 78 FR 67035

(November 12, 2014).

2. Revise § 744.17 to read as follows:

§ 744.17 Restrictions on certain exports, reexports and transfers (in-country) of microprocessors and associated “software” and “technology” for ‘military end uses’ and to ‘military end users.’

(a) *General prohibition.* In addition to the license requirements set forth elsewhere in the EAR, you may not export, reexport or transfer (in-country) microprocessors (“microprocessor microcircuits,” “microcomputer microcircuits,” and microcontroller microcircuits having a processing speed of 5 GFLOPS or more and an arithmetic logic unit with an access width of 32 bit or more, including those incorporating “information security” functionality), or associated “software” and “technology” for the “production” or “development” of such microprocessors without a license if, at the time of the export, reexport or transfer (in-country), you know, have reason to know, or are informed by BIS that the item will be or is intended to be used for a ‘military end use,’ as defined in paragraph (d) of this section, in a destination listed in Country Group D:1 (see Supplement No. 1 to part 740 of the EAR); or by a ‘military end user,’ as defined in paragraph (e) of this section, in a destination listed in Country Group D:1.

(b) *Additional prohibition on exporters or reexporters informed by BIS.* BIS may inform an exporter, reexporter or transferor, either individually by specific notice or through amendment to the EAR, that a license is required for export, reexport or transfer (in-country) of items described in paragraph (a) of this section to specified end users, because BIS has determined that there is an unacceptable risk of diversion to the end uses or end users described in paragraph (a) of this section. Specific notice is to be given only by, or at the direction of, the

Deputy Assistant Secretary for Export Administration. When such notice is provided orally, it will be followed by a written notice within two working days signed by the Deputy Assistant Secretary for Export Administration. The absence of any such notification does not excuse the exporter, reexporter or transferor from compliance with the license requirements of paragraph (a) of this section.

(c) *License review standards.* There is a presumption of denial for applications to export, reexport or transfer (in-country) items subject to this section.

(d) *Military end-use.* In this section, the phrase ‘military end use’ means incorporation into: a military item described on the U.S. Munitions List (USML) (22 CFR part 121, International Traffic in Arms Regulations) or the Wassenaar Arrangement Munitions List (as set out on the Wassenaar Arrangement website at <http://www.wassenaar.org>); commodities classified under ECCNs ending in “A018” or under “600 series” ECCNs; or any commodity that is designed for the “use,” “development,” “production,” or deployment of military items described on the USML, the Wassenaar Arrangement Munitions List or classified under ECCNs ending in “A018” or under “600 series” ECCNs. Supplement No. 1 of this part lists examples of ‘military end use.’

(e) *Military end user.* In this section, the term ‘military end user’ means the national armed services (army, navy, marine, air force, or coast guard), as well as the national guard and national police, government intelligence or reconnaissance organizations, or any person or entity whose actions or functions are intended to support ‘military end uses’ as defined in paragraph (d) of this section.

(f) *Exceptions.* The prohibitions described in paragraphs (a) and (b) of this section supersede any license exception or No License Required (NLR) designation that would otherwise apply to a transaction subject to the EAR, except that this license requirement does not apply to exports, reexports or transfers (in-country) of items for or on behalf of the official use by personnel and agencies of the U.S. Government or to agencies of a cooperating government authorized by License Exception GOV pursuant to § 740.11 of the EAR. See § 740.11(b)(1) of the EAR for the definition of ‘agency of the U.S. Government’ and §740.11(c)(1) for the definition of ‘agency of a cooperating government.’

PART 774 [AMENDED]

3. The authority citation for Part 774 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.*; 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 15 U.S.C. 1824a; 50 U.S.C. app. 5; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 7, 2014, 79 FR 46959 (August 11, 2014).

Supplement No. 1 to Part 774 – [Amended]

4. In Supplement No. 1 to Part 774 (the Commerce Control List), ECCNs 3A001, 3D002, 3D991, 3E001, 3E002, 3E991, 5A002, 5A992, 5D002, 5D992, 5E002 and

5E992 are amended by adding a License Requirement Note after the Control Table in the License Requirements section to read as follows:

Supplement No. 1 to Part 774 – Commerce Control List

License Requirements

***License Requirements Note:** See § 744.17 of the EAR for additional license requirements for microprocessors having a processing speed of 5 GFLOPS or more and an arithmetic logic unit with an access width of 32 bit or more, including those incorporating “information security” functionality, and associated “software” and “technology” for the “production” or “development” of such microprocessors.*

5. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 3, ECCN

3A991 is amended by revising the License Requirements Notes to read as follows:

3A991 Electronic devices, and “components” not controlled by 3A001.

License Requirements

License Requirements Note:

See § 744.17 of the EAR for additional license requirements for microprocessors having a processing speed of 5 GFLOPS or more and an arithmetic logic unit with an access width of 32 bit or more, including those incorporating “information security” functionality, and associated “software” and “technology” for the “production” or “development” of such microprocessors.

Dated: December 11, 2014

Kevin J. Wolf,

Assistant Secretary for Export Administration.

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